Supreme Court, U.S.
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No. _____

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In the
SUPREME COURT OF THE UNITED STATES

October Term, 1993

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Balmain B. Comrie and Juanita A. Comrie, on behalf of themselves and of all others similarly situated, *Petitioners*,

v.

Federal National Mortgage Association, *Respondents*.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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**PETITION FOR A WRIT OF CERTIORARI**

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October 1993

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## QUESTION PRESENTED FOR REVIEW

Whether the Eleventh Circuit Court of Appeals erred by affirming the District Court's dismissal of Petitioners' Complaint for Declaratory Relief since the complaint presented an "actual case or controversy", and since the decision is in conflict with the decision of this Court and other Circuit Courts of Appeal?

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**IN THE SUPREME COURT OF THE UNITED STATES**

October Term, 1993

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BALMAIN B. COMRIE AND JUANITA A. COMRIE, ON BEHALF OF THEMSELVES AND OF ALL OTHERS SIMILARLY SITUATED, *Petitioners*,

v.

FEDERAL NATIONAL MORTGAGE ASSOCIATION, *Respondents*.

---

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

---

Balmain B. Comrie and Juanita A. Comrie on behalf of themselves and all others similarly situated respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

**OPINION BELOW**

The decision of the Court of Appeals (App. 3) is reported at 8 F.3d 36. The

Eleventh Circuit's denial of the Petitioners' Motion for Rehearing is not reported. (App. 4) The decision of the district court is unreported. (App. 2)

**JURISDICTION**

The Court of Appeals entered its denial of Petitioners' Motion for Rehearing on January 11, 1994. (App. 4) The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

**STATUTORY PROVISION INVOLVED**

28 U.S.C. §2201(a) provides that "In a case of actual controversy within its jurisdiction... any court of the United States, upon the filing of an appropriate pleading, may declare the rights or other legal relations of any interested party seeking such declaration, whether or not such further relief is or could be sought."

## STATEMENT

### A. Introduction

The Petitioners, the Comries and the class they seek to represent, are purchasers of houses as a result of a widespread land fraud scheme perpetuated by General Development Corp. (GDC), one of the largest land sales and development companies in Florida. Using non-standard appraisals and other methods, GDC convinced the purchasers that their houses were worth far more than their actual value. Inflated mortgages on these houses were financed by GDV Financial Corp. (GDV) GDC's wholly owned subsidiary who sold the notes and mortgages to the Respondent, the Federal National Mortgage Association (FNMA). FNMA was aware of the overpricing of the houses and the non-standard appraisals.

The Petitioners filed a class action suit against FNMA alleging the notes and mortgages were unconscionable and therefore unenforceable in their fact amounts and asking the Court to make a determination under 28 U.S.C. §2201(a) as to whether they have affirmative defenses based on this fraud, available to mortgage foreclosure actions and/or suits on those notes brought by FNMA. (App. 1) The District Court dismissed the Complaint basing its decision on several cases, citing to the lack of "case or controversy". The Court of Appeals summarily affirmed the District Court's decision and denied the Petitioners' Request for Rehearing.

**B. Proceedings Below**

The Petitioners and the class they seek to represent are all purchasers of

GDC houses which were financed by GDV. The notes and mortgages were sold by GDV to FNMA. The Comries filed a class action against FNMA. In Count I of that action, they sought declaratory relief as to whether they are entitled to recoupment and a determination of whether they have affirmative defenses available to mortgage foreclosure actions or suits on these notes brought by FNMA based on the fraud and FNMA's knowledge of the overpricing and non-standard appraisal The Comries contended that FNMA as purchaser of the notes and mortgages took them subject to all the claims and defenses which the class members would have against GDC and GDV. At the time of the filing of their complaint, FNMA had already sought to foreclose on many such mortgages purchased from GDV.

The Comries filed their initial class action Complaint on January 16, 1991 and First Amended Complaint on March 1, 1991. Their Second Amended Complaint and Motion to Determine Class was filed on June 21, 1991. The Defendant filed a Motion to Dismiss the Second Amended Complaint. The Court entered the order granting Defendant's Motion to Dismiss without leave to amend on August 19, 1992. (App. 2)

GDC was one of the largest land development and land sales companies in Florida. It had been in business over 30 years, was listed on the New York Stock Exchange, had over $1 billion in assets, and had over 200,000 people living in 9 communities across the state of Florida. GDC's primary business was the sale of lots to out-of-state residents using

installment land sales contracts. At some point after purchasing their GDC lots, the GDC customer was encouraged to use the "equity" he had built up in his lot as a down payment on a GDC house or condominium.

However, GDC concealed from the purchaser that the lot "equity" that he was using as a down payment really was fictitious. It was based on GDC's "selling price" and not "fair market value".

The purchasers also had no way of knowing that GDV, GDC's wholly owned mortgage broker subsidiary, was not arranging arms length funding of the mortgages but was selling the "paper" in bulk to lenders who had pre-arranged commitments to purchase the mortgages.

The purchasers were not told that because of the overpricing of the houses, the lender, (FNMA) was not satisfied with the house, and the purchasers' obligation to pay on the note and mortgage as security for its commitment to provide funding of the note and mortgage, but also required agreements to repurchase by GDV should the purchaser default, and further required that GDV's performance be secured by letters of credit.[1/]

---

1/On January 3, 1983 FNMA and GDV entered into a Mortgage Seller and Servicing Agreement. By July 1985, FNMA had purchased over 2000 GDV loans having an aggregate principal balance of over $100,000,000.00 and received over $3.5 million in fees from GDV. (R.27:18) Due to discovery of what FNMA termed GDC's "substantial overvaluation" of GDC housing units on January 28, 1985 FNMA, and GDV entered into a "Repurchase Agreement". The agreement required GDV to repurchase any mortgages in default and provided for additional protection by the issuing of letters of credit which by April of 1990 totaled $5.1 million which

(continued...)

The Petitioners and other members of the putative class had no way of knowing that:

(a) the information which GDC put on the **Residential Home Loan Mortgage Application** concerning the value of the lots was false.

(b) the **Lot Equity Transfer Agreement** which was prepared by GDV transferred phony equity.

(c) the **Affidavit of Purchaser and Vendor** which was filled in by GDV and signed by each purchaser and GDV under penalty of perjury and federal penalties which attested to a 75% loan to value ratio was false.

---

1/(...continued)
FNMA drew on or about June 1, 1990. At that time 87 mortgage loans were in foreclosure.

(d) the note and mortgage the purchaser signed was for an amount equal to or greater than the fair market value of the house.

(e) the appraisal the purchaser paid for was not a conventional appraisal of fair market value in accordance with FNMA\FHLMC guidelines but was a non-conforming appraisal based solely on GDC's selling price.

(f) FNMA knew about the non-conforming appraisals and protected itself with credit enhancements.

Moreover, the Petitioners had no way of knowing that after giving up their lots and all the payments they'd made on them over the years, after paying their down payment, and cash to close, and appraisal fees, they would be saddled

with a mortgage for more than the house was worth and have lost all their cash.

GDC was indicted and pled guilty to one count of criminal conspiracy to defraud. GDC's President, Chairman of the Board and two officers were indicted. After a ten month trial, two were convicted of 39 counts of criminal fraud and conspiracy and two were convicted of criminal conspiracy to commit fraud. GDC and GDV filed for bankruptcy protection under Chapter 11. GDV was dissolved and GDC emerged from Chapter 11 as Atlantic Gulf Communities Corporation ("AGCC"). The notes and mortgages are still held by the institutional investors, in this case, FNMA. The mortgages and notes which were the subject of the various forward purchase commitment agreements and other agreements between FNMA, GDC

and GDV were obtained by GDC and GDV from the class representatives and the class members.

The Comries on behalf of themselves and others similarly situated sought a declaration that the mortgage loans FNMA acquired from GDV are unconscionable and subject to valid claims and defenses which they could assert against the Respondent thereby rendering the loans unenforceable against Petitioners in their face amount.

In granting the defendant's Motion to Dismiss the court stated with respect to Count I:

> 1. With regard to the Count I claim for declaratory relief, see the law set forth in Emory v. Peeler, 756 F.2d 1547 1551-52 (11th Cir. 1985). See also Angora Enterprises, Inc. v. Condominium Association of Lakeside Village, Inc., 796 F.2d 384, 387-88 (11th Cir. 1986). And see In Re Smith,

737 F.2d 1549, 1552 n.7 (11 Cir. 1984), and Allie v. Ionata, 503 So.2d 1237, 1239-40, (Fla. 1987). (App. 2)

The Petitioners appealed that decision, but the Eleventh Circuit summarily affirmed the decision of the District Court. (App. 3) Thereafter, the Comries filed a Petition for Rehearing and Suggestion of En Banc Rehearing but these were denied. (App. 4)

**REASONS FOR GRANTING THE PETITION**

The decisions of the District Court of the Eleventh Circuit in this case have left the Comries and approximately 1,500 other innocent victims of a sophisticated criminal land fraud in the position of having to risk foreclosure on their homes without a decision as to whether or not they may assert affirmative defenses to foreclosure against the Respondent, FNMA. Without a class action, these victims are

essentially left without a remedy. The amount at issue in any individual case does not warrant the expense of establishing GDC's sophisticated land fraud scheme. Furthermore, the decision in this case that there is no "case or controversy" is erroneous and in clear conflict with decisions of this Court and that of other circuit courts. Additionally, the decision is an important one not only to the Comries and over one thousand other homeowners but also to other citizens who under the precedent of this decision will have to risk dire consequences because of the Court's refusal to act.

## I. The Court's Interpretation of 28 U.S.C. §2201 Is In Conflict With Decisions of This Court and Decisions of Other Circuit Courts of Appeal

In its decision in this case, the Court dismissed the Petitioners claim for declaratory relief which asked the Court to determine if they could raise affirmative defenses against the Respondent in an action for foreclosure brought by FNMA against them.

The district court relied primarily on a portion of the case of Emory v. Peeler, 756 F.2d 1547, 1551-52 (11th Cir. 1985) holding that there was no "case or controversy".

In that case the Petitioner had been a juror in a state court murder trial who brought an action against a judge who had presided over the trial. Following the trial, the juror had been singled out by the judge in court as the only juror to vote against the death penalty. Later, that judge had made additional comments

about the juror to a news reporter. The juror sought declaratory relief asking the district court to find that the statements made about him were in violation of his constitutional rights and the laws of Georgia. The Court held that the district court was correct in dismissing the action finding that:

> "The mere possibility that Emory will once again be summoned, qualified, and selected to sit as a juror in a capital case before Judge Peeler and perhaps subjected to a re-enactment of the scenario that occurred in this case is too remote to be labeled a controversy" (at p. 1552)

The Appellate court in Emory, supra, at p. 1551-52 states:

> "...A declaratory judgment may only be issued in a case of an actual controversy, that is, under the facts alleged, there must be a substantial continuing controversy between parties having an adverse legal interest. (Citations omitted)

> The plaintiff must allege facts from which the continuation of the dispute may be reasonably inferred. (citations omitted)
>
> Additionally, the continuing controversy may not be conjectural, hypothetical, or contingent; it must be real and immediate, and create a definite, rather than a speculative, threat of future injury. (Citations omitted)
>
> A remote possibility that a future injury may happen is not sufficient to satisfy the 'actual controversy' requirement for declaratory judgments..."

In this case, the controversy is not "conjectural,, hypothetical or contingent". The Petitioners have a continuing obligation to make payments and cannot be relieved from this obligation without going into default on their notes and mortgages, risking foreclosure, and the possible loss of their homes. Under the decision in this

case, they would have to take such a perilous step.

In this case, the Eleventh Circuit has apparently misinterpreted or misapplied the precedents of this court and others. In Doe v. Bolton, 410 U.S. 179, 188, 35 L. Ed 2d 201, 210, 93 S. Ct. 739 (1973) Georgia doctors consulted by pregnant women presented a justiciable controversy and had standing to obtain a declaration concerning the constitutionality of state abortion Statutes even though none of them had been prosecuted or threatened with prosecution for violation of the state's abortion statute. The physicians had not even performed abortions, but were still entitled to bring the action.

While not spelled out in the district court's decision, its reliance

upon Emory makes it clear that the Court concluded that the Petitioners' case was not suitable for Declaratory Relief because no foreclosure suit had yet been brought against them.

This is also in clear conflict with the decision of this Court in Evers v. Dwyer, 358 U.S. 146 79 S.Ct. 178, 3 L.Ed. 2d 222 (1958). In that case, a black resident of Memphis, Tennessee brought a class action seeking a declaration of his claimed constitutional right and that of others similarly situated to travel on buses within the city, without being subjected to Tennessee Code requirements calling for segregated seating arrangements on account of race. The District Court dismissed the complaint on the grounds that there was no "actual controversy" within 28 U.S.C. §2201

finding that the Plaintiff had ridden a bus in Memphis only once and had "boarded the bus for the purpose of instituting this litigation."

This Court found that there was an actual controversy, stating:

> "We do not believe that Appellant, in order to demonstrate the existence of an "actual controversy"... was bound to continue to ride the Memphis buses at the risk of arrest if he refused to seat himself in the space in such vehicles assigned to colored passengers." (at p. 179)

Likewise in this case while the Petitioners had not had foreclosure actions brought against them, other individuals just like the Petitioners had. The lower court's decision finding that they were required to "risk more" in order to demonstrate an actual controversy is in conflict with these decisions.

See also Broadview Chemical Corp. v. Loctite Corp., 417 F.2d 998, 999-1000 (2d Cir. 1969) (Action brought by plaintiff who was under injunction not to violate any of defendant's patents, sought declaration that certain of plaintiff's products did not infringe patents presented actual controversy). E. Edelmann & Co. v. Triple-A Specialty Co., 88 F.2d 852, 854 (7th Cir. 1939)

In Lindsey v. Normet, 405 U.S. 56, 92 S.Ct. 862, 31 L.Ed. 2d 36 (1972), appellants were month to month tenants paying $100 a month for the use of a single family residence. The City of Portland declared the building unfit finding numerous violations of the Housing Code. The property was posted noticing that the dwelling should be vacated within thirty days unless the

owner could show cause why the building should not be declared unfit for human occupancy. The tenants stopped paying rent after the landlord refused their request for repairs. The landlord's attorney wrote a letter threatening legal action. The tenants filed a class action for declaratory and injunctive relief, complaining of statutory requirements that the eviction trial must occur within two to six days after service of the complaint and would be limited to the tenants default without allowing presentation of defenses based on the landlord's breach of his duty to maintain the premises. Permission to maintain the suit as a class action was granted. (Lindsey p. 58 footnote 1) The trial court held that the statutory provisions violated neither the due process clause

nor the equal protection clause and dismissed the tenant's complaint. The Supreme Court affirmed.

In Lindsey the tenants stopped paying, put their right to occupy their apartments at issue, lost the declaratory action and were evicted. In this case, the Petitioners while continuing to pay wished to challenge the Respondent's rights to collect the full amounts of the notes and mortgages. In Lindsey where the tenants stopped payment they found out that they could not attack the statute and could not raise the issue of the unfitness for habitation and still stay in their homes.

The Petitioners in this case were seeking to avoid damages before they occur by a determination of the class members "rights and other legal

relations". This prophylactic nature of declaratory relief in a class action context has been seen in a variety of settings.[2/]

The Supreme Court has determined that declaratory relief may be appropriate even where the trial court rules Plaintiff is seeking an advisory opinion. In the case of Lake Carriers Association v. MacMullan, 406 US 498, 32 L.Ed. 2d 257, 92 S.Ct. 1749 (1972) plaintiffs appealed from a ruling dismissing their complaint to have the Michigan Watercraft Pollution Control Act declared invalid and its enforcement

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2/Apperson v. Arkansas, 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed. 2d 228 (1968). The United States Supreme Court recognized the right of a school teacher, not yet criminally charged, to seek a declaratory judgment that her state's anti-evolution statute was unconstitutional even though it had never been enforced in nearly 40 years.

enjoined. The plaintiffs, an Association and individual members who own and operate federally enrolled and licensed vessels, challenged the law as being beyond the state's police power and placing an undue burden on interstate and foreign commerce, impermissibly interfering with the Uniform Maritime Law, denying due process and equal protection and unconstitutionally vague, and federally preempted. The District Court did not reach the merits of appellants' complaint because of the "lack of a justiciable controversy" and found that the plaintiffs were "seeking an advisory opinion" (at p. 265). (Emphasis supplied)

However the Supreme Court found that the complaint did present an actual controversy that was ripe for decision

because of the issues as to the Plaintiffs obligation under Michigan Federal Law.

> For if appellants are now under such an obligation, that in and of itself makes their attack on the validity of the law a live controversy, and not an attempt to obtain an advisory opinion."
> at p. 506 (Citations omitted)
> (Emphasis supplied)

In the case at bar, the Petitioners are far worse off than the plaintiffs in the Lake Carriers case. Michigan authorities had not yet determined how to enforce their law. Fannie Mae has made it clear that it will enforce its rights under the notes and mortgages if the Petitioners stop paying. In Lake Carriers declaratory relief could be

sought by Plaintiffs in Court while here no relief is available, short of foreclosure. In Lake Carriers the District Court felt that there was a possibility that Michigan's law and Federal law, could be interpreted . consistently. In this case there is no construction of law which will preclude foreclosure if the Petitioners stopped paying on their mortgages. Yet in Lake Carriers the Court found that since "compliance is coerced by the threat of enforcement. . . the controversy is both immediate and real" at p. 508 (Emphasis supplied).

Likewise in the case at bar "compliance [payment on the note] is coerced by the threat of enforcement" of the lender's rights by foreclosure and

destruction of credit, and the controversy is "immediate and real".

## II. The Decision of the Court of Appeals Is Erroneous

The courts have repeatedly stated that "the Declaratory Judgment Act and Rule 57 should be liberally construed to achieve the objectives of the declaratory remedy." McDougald v. Jensen, 786 F.2d 1465, 1481 (11th Cir. 1986); Allstate Ins. Co. v. Employee Liability Assurance Corp., 445 F.2d 1278, 1280 (5th cir. 1971).

The purpose of the Act is to "avoid accrual of avoidable damages". The Act in a spirit of preventive justice provides relief for the parties in situations where previously not even equity could reach. Professor Moore

discussing the purpose of the act at paragraph 57.05 (p. 57-91) states:

> "The federal Declaratory Judgment Act authorizes a court of the United States, in cases within its jurisdiction, to grant litigants approximately the same declaratory relief previously administered by a majority of the state courts. Under the Act, relief is confined to a case of 'actual controversy' within the court's jurisdiction, but within this area a court of the United States 'may declare the rights and other legal relations of any interested party seeking such declaration.'...
>
> The uniqueness of the declaratory remedy lies rather in its potential, prophylactic character, and in the fact that it is an all-purpose writ. Moores Federal Practice 57.05 (p. 57-91)

The prophylactic nature of declaratory judgment relief can be seen in a variety of settings. In patent actions the potentially infringing company can seek declaratory relief to determine the

validity of a patent prior to infringing and being sued for patent infringement.

The court in E. Edelmann and Co. v. Triple-A Specialty Co., 88 F.2d 852 at p. 854 (7th Cir. 1937) discussing the declaratory judgment act states:

> It was the congressional intent to avoid accrual of avoidable damages to one not certain of his rights and to afford him an early adjudication without waiting until his adversary should see fit to begin suit, after damage had accrued.

In the instant case, the Respondent has been able to compel continued loan payments by threatening the Petitioners with foreclosure while hiding beneath the mantle of a holder in due course who is immune from the Petitioners claims and defenses. Just as a potential competitor in a patent case is allowed to determine whether the patent is valid without committing resources to an activity that

could result in liability for damages, so the Petitioners should have been allowed to determine whether or not meritorious claims and defenses could be asserted against FNMA without being required to stop making mortgage payments and await foreclosure. See also, Phillips Petroleum Co. v. Shell Development Co., 6 F.R.D. 406 (D.Del. 1947); and Chicago Metallic Mfg. Co. v. Katzinger, 123 F.2d 518 (7th Cir. 1941).

Declaratory judgments have often been entered in contract actions where a potential defendant in a breach of contract action seeks a declaration of his obligations under the contract rather than acting at his peril and risk being penalized subsequent to breach.

Discussing the issue of what constitutes an actual controversy for

purpose of declaratory judgment,

Professor Moore at Paragraph 57.11 (page

57-91) states:

> Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 57 S.Ct. 461, 81 L.Ed. 617 (1937) is the leading case in the area of private litigation... [1] The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interest... [2] It must be a real and substantial controversy admitting a specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be on a hypothetical state of facts...Moores Federal Practice 57.11 (p. 57-91)

## III. The Question Presented Is Important

Since at least its decision in Doe v. Bolton, 410 U.S. 179, 35 L. Fd. 2d 201, 93 S.Ct. 7391 (1973), this Court has made it clear that it is not necessary for litigants to suffer dire consequences before being able to satisfy the "case or controversy" requirement of the Declaratory Action statute.

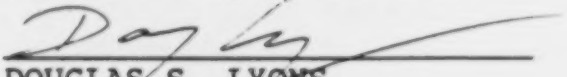
The lower court decision in this case makes it incumbent on these Petitioners to risk the loss of their homes before being able to determine issues that rightly should have been determined by Declaratory Action. Furthermore, the failure to resolve this issue in the context of this class action litigation will mean that the class Plaintiffs are essentially deprived of

relief. The economies of any individual case do not warrant the expense of proving GDC's fraud and FNMA's lack of standing as a holder in due course.

**CONCLUSION**

Wherefore, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,



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October 1993

# APPENDIX

UNITED STATES FEDERAL COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 91-0140-CIV-KEHOE

BALMAIN B. COMRIE and
JUANITA A. COMRIE, on
behalf of themselves and
of all others similarly
situated,

Plaintiffs,
v.

FEDERAL NATIONAL MORTGAGE
ASSOCIATION,

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UNITED STATES FEDERAL COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 91-0140-CIV-KEHOE

BALMAIN B. COMRIE and
JUANITA A. COMRIE, on
behalf of themselves and
all others similarly
situated,

Plaintiffs,

v.

FEDERAL NATIONAL MORTGAGE
ASSOCIATION,

Defendant
_____/

**SECOND AMENDED COMPLAINT FOR DECLARATORY RELIEF CLASS REPRESENTATION**

Class Representatives BALMAIN B. COMRIE and JUANITA A. COMRIE, on behalf of themselves and all others similarly situated ("Plaintiffs") sues Defendant, FEDERAL NATIONAL MORTGAGE ASSOCIATION, ("FNMA"), and allege:

1. **JURISDICTION AND VENUE.** Jurisdiction lies pursuant to Title 12 U.S.C. 1723(a) and 28 U.S.C. 1332. FNMA

is deemed to be a District of Columbia corporation under 12 U.S.C. 1717(2)(B).

2. **ACTION**. This is an action pursuant to Title 28 U.S.C. 2201 and 2202 and Rule 57 Fed.R.Civ.P. for a declaratory judgment and supplemental relief and seeks recoupment and damages for unconscionability, breach of fiduciary duty, breach of contract, and negligent loan processing, exclusive of interest and costs, in excess of $50,000.

**PARTIES**

3. **PLAINTIFFS**. Class Representatives BALMAIN and JUANITA COMRIE are residents of New York, are sui juris and bring this action individually and as representatives of all others similarly situated ("Plaintiffs").

4. **DEFENDANT FNMA**. FNMA is a body corporate created by the Congress and

deemed to be a District of Columbia corporation under 12 U.S.C. 1717(2)(B) and has regional offices in Atlanta, Georgia.

5. **SUBJECT MORTGAGE LOANS**. GDV represented that the subject mortgage loans sold to FNMA were 75% of the value of the secured properties. The loans were executed by the Plaintiffs in connection with the purchase of single family residential properties constructed by General Development Corporation ("GDC") and located within GDC Florida communities. All of the mortgage loans were originated by GDV Financial Corporation ("GDC"), a licensed mortgage broker and wholly owned subsidiary controlled by GDC. GDV assigned the mortgage loans to FNMA, the present holder.

**FACTUAL ALLEGATIONS AS TO GDC**

6. **PROFILE**. GDC is one of the oldest and largest builders of planned communities in Florida. GDC at all times material hereto was a New York Stock Exchange listed company with approximately one billion dollars in assets. GDC has been in the land development business for over 30 years, was developing 9 communities with over 200,000 residents throughout the state, owned approximately 289,000 acres of Florida real estate and had over 4,000 employees. GDC has its main offices in Miami, Florida. The vast majority of the purchasers of GDC houses were from out-of-state and all of the Plaintiffs had already purchased an undeveloped GDC homesite in one of GDC's Florida communities pursuant to an installment sales contract. GDC solicited the purchasers to "trade-in" their lot for

a credit equal to their equity and "appreciation" in these unimproved homesites in connection with the purchase of a GDC house or condominium located on another homesite in a GDC community.

7. **PRICING**. GDC charged prices for its properties which were substantially higher than the prices of other comparable product sold in the same communities, both by other builders and even by GDC itself through its subsidiary, Five Star Homes. In addition, GDC generally charged prices for its houses and condominium units which were substantially higher than the prices at which they could be resold. GDC had another subsidiary, Florida Home Finders, Inc., ("FHF"), a realty firm, which resold GDC houses, as a broker, at such lower prices. FHF also brokered the sale of--and on occasion repurchased for GDC-GDC

homesites at prices substantially lower than GDC charged its customers for comparable homesites.

8. **HOMESITE TRADE-IN**. GDC offered Plaintiff homesite purchasers sales concessions and credits as part of a sales program intended to solicit them to trade-in their homesites and to transfer the equity and "appreciate"as partial consideration for the purchase of a residential structure to be constructed on another building lot. Together, the lot and structure built thereon constituted a GDC "Housing Unit" (sometimes referred to for convenience as "GDC house"). GDC's "Lot Equity Trade" sales program transferred an amount measured by principal payments and GDC determined "appreciation" on the original homesite to be used as partial consideration for the

Housing Unit purchase. GDC often offered as a sales concessions a credit against the purchase price, typically of $2,000-$3,000, if the buyer closed the transaction within a specific number of days after receiving notice from GDC.

9. **FINANCING**. GDC contract documents offered the buyers a financing contingency only if the buyers applied for a conventional purchase money mortgage loan from GDC's undisclosed "designated" lender. In order to arrange for a mortgage loan from GDC's designated lender, the buyers were directed to GDC's wholly owned and controlled subsidiary, GDV, a licensed mortgage broker.

10. **ONE-STOP SHOPPING**. Other GDC controlled subsidiaries provided utilities, construction and engineering services, title insurance, hazard

insurance, and rental brokerage services to Plaintiffs as part of what GDC called its "One-Stop Shopping" for the Housing Unit purchase.

**FACTUAL ALLEGATIONS AS TO GDV**

11. **PROFILE**. GDV was wholly owned and controlled by GDC, had interlocking officers, had no separate will or identity, and was used as a mere instrumentality of GDC to arrange financing for the purchase of GDC Housing Units and to sell and service the mortgages thus procured. GDV funded the mortgage loans through a "warehousing" facility at Southeast Bank and then sold the loans to a "designated lender". The immediate and pre-arranged sale of the GDV-originated mortgages was critical to the economic viability of GDC's Housing

Unit sales programs and provided essential cash flow.

12. **MORTGAGE PLACEMENT**. Prior to accepting Plaintiffs' loan application, GDV had entered into a mortgage selling and servicing contract, GDV sold over 2,000 mortgage loans to FNMA in a total aggregate amount in excess of $100,000,000, and thereafter serviced the loans for a serving fee equal to approximately 0.55% of the principal balance per annum. GDV paid fees to FNMA of approximately $3.5 million in connection with sale of the subject loans.

13. **MORTGAGE BROKERAGE SERVICES**. GDV, as mortgage broker, and in consideration of a loan application fee, assisted buyers in the completion of standard FNMA/FHLMC residential loan applications for "conventional financing"

for the purpose of purchasing GDC Housing Units. GDV also performed underwriting services, supervised the preparation and execution of the mortgage, deed and note, an affidavit of purchaser and vendor for investment property, and other closing documents, and placed the loans with FNMA. As compensation for these services GDC charged the Plaintiffs a documents preparation fee, appraisal and credit report fees and a loan origination fee.

14. **APPRAISALS**. In connection with its loan underwriting and placement services, GDC had an appraisal done on each GDC house by one of several appraisers it regularly retained. GDV's appraisals (also referred to hereinafter as "non-conforming appraisals") were designated to support the price of GDC houses. That is, the appraisals were

performed by a method which was intended to show that the market value of the house equaled the GDC price. This result was achieved by using only other GDC house sales as comparables to determine market value. This appraisal method did not conform to generally accepted appraisal standards in the real estate industry or to FNMA standards. By contrast, an appraisal performed according to generally accepted appraisal standards (also referred to hereinafter as a "conforming appraisal") did not limit the selection of house used as comparable to new houses built by a particular builder. Instead, a conforming appraisal selected comparables according to the characteristics of the house, and could not arbitrarily exclude new sales of other builders or resales of similar houses in the same communities. A

conforming appraisal of a GDC house always showed a market value substantially lower than the GDC sale price, and except in extraordinary instances, lower than the GDV mortgage loan amount. That was because the prices of comparable new houses built by other builders (and by GDC subsidiary Five Star Homes) and the prices of GDC houses on resale were substantially lower than the GDC prices for houses sold under the lot equity trade-in marketing program. The statements of value of the lots traded-in were based on GDC current sales prices for similar properties.

15. SECONDARY MORTGAGE MARKET. Procurement of inflated, non-conforming appraisals and concealment from Plaintiffs of GDC's substantial over-pricing of its Housing Units was necessary in order for GDV to qualify the mortgage loans for sale

in the secondary market to FNMA as conventional residential mortgages with acceptable loan-to-value ratios.

**FACTUAL ALLEGATIONS AS TO FNMA**

16. **PROFILE**. FNMA is a corporate instrumentality of the United States, created by Congress under 12 U.S.C. §1717 et seq. FNMA is chartered to provide supplementary assistance to the secondary market for home mortgages by providing a degree of the liquidity for mortgage investments, thereby improving the distribution of investment capital available for home mortgage financing. To carry out its purpose, FNMA is authorized to purchase and resell conventional residential mortgages ordinarily in amounts not exceeding 80% of the value of the property securing the loan. FNMA then utilizes banks and other financial

institutions throughout the United States to service the mortgages it acquires.

17. **PRELIMINARY DEALINGS**. From about 1978 through 1982 GDV sold its mortgage loans primarily to savings and loan associations. The savings and loans often sold the GDV loans to FNMA. On July 29, 1982, a GDV representative and an appraiser retained by GDV met with FNMA representatives to discuss doing business together. The use of GDC houses as comparables in preparing appraisals was discussed. On August 5, 1982 GDV explained that its lot trade-in sales program current value was based on GDC list prices. FNMA specifically approved the GDC lot equity and appreciation "trade-in" computation as an acceptable means of establishing value and equity in

the sale of GDC products on August 30, 1982.

18. **AGREEMENT TO PURCHASE GDV LOANS**. On January 3, 1983, GDV and FNMA entered into a mortgage selling and servicing contract. By July 1985, FNMA had purchased, (under various commitments) about 2000 GDV loans having an aggregate principal balance of over $100,000,000, and received over $3.5 million in fees from GDV.

19. **KNOWLEDGE AND CONSENT**. FNMA approved the GDC lot trade-in valuation procedure and controlled and set the standards for all material aspects of GDV loan underwriting, and closing. FNMA also consented to the appraisal methodology used by GDV appraisers. FNMA conducted numerous post purchase reviews and was aware that the original values for GDC

Housing Units set forth in appraisals used by GDV in the loan underwriting process were not accurate. While FNMA criticized the use of GDC houses as comparables, (and even notified GDV that the original values indicated were not "supported") at various times in 1983 and 1984, FNMA did not object until September, 1984.

20. **REPURCHASE AGREEMENTS**. On September 24, 1984, GDV representatives and an appraiser retained by GDV met with FNMA representatives to discuss the appraisal methodology being used to appraise GDC Housing Units. FNMA confirmed that the methodology used in preparing GDV appraisals did not conform to its guidelines. FNMA commissioned 4 market studies to determine whether the value of GDC Housing Units complied with the prescribed 75% loan-to-value ratios.

The initial study concluded the resale prices were 36-43% below GDC sale prices. As a result, on January 28, 1985, FNMA, GDC and GDV entered into a "Repurchase Agreement". The agreement required GDC to repurchase loans in default because of "substantial overvaluation" of the GDC Housing Units at the same time. FNMA informally agreed to purchase $20 million in additional GDC loans - subject to repurchase - and in fact purchased GDV loans sold. GDV remained an authorized FNMA servicer until GDC terminated the agreement in February, 1991, pursuant to Federal Bankruptcy proceedings.

21. **SUBSEQUENT REPURCHASE AGREEMENT**. Prior to the expiration of the Repurchase Agreement, GDC and GDV entered into another Repurchase Agreement dated June 1, 1989. GDC's obligation to repurchase

defaulting loans sold to FNMA was secured by a $5.1 million letter of credit issued by a Japanese Bank on January 12, 1990. On or about June 1, 1990, FNMA drew on the letter of credit and was paid $5.1 million in consideration of GDC's repurchase obligation.

**FACTUAL ALLEGATIONS AS TO THE CLASS REPRESENTATIVES**

22. **GDC HOUSE PURCHASE**. The class representatives, during a SOHO trip, entered into a contract with GDC to purchase a Housing Unit in Port St. Lucie, Florida, for a total sales price of $62,986. As a part of the contract, the class representatives entered into two "lot equity transfer agreements". Under the transfer agreements the class representatives received a total "lot equity trade" credit of $15,901.95 towards the Housing Unit sales price. GDC also

allowed the class represenatives a $299 credit as a sales program.

22. **PROPOSED MORTGAGE FINANCING**. The contract also provided for a proposed mortgage of $45,000 and required the class representatives to apply to an undisclosed "designated lender" for the financing required under the contract. GDC referred the class representatives to its mortgage broker, GDV, to arrange for the financing.

23. **MORTGAGE BROKERAGE SERVICE**. GDV required the class representatives to complete a mortgage questionnaire and to pay a loan application fee of $125. GDV prepared, on behalf of the class representatives, a FNMA form of residential loan application fort "conventional financing" for the purpose of purchasing the Housing Unit. GDV performed loan underwriting, obtained an

appraisal for the Housing Unit and lots traded-in, and prepared loan and conveyance documents. On June 28, 1983 the class representatives executed a uniform FNMA adjustable graduated payment rate note and a mortgage for $45,000, which was contemporaneously assigned to FNMA. The class representatives received a deed to the Housing Unit from GDC.

24. **GDV FEES**. In consideration of GDV's mortgage brokerage services, the Plaintiffs paid to GDV a loan application fee of $125 which was credited against the 4.5% loan origination fee of $2,025, an appraisal fee of $110, and a credit report fee of $32.50.

26. **NEGATIVE EQUITY**. The class representatives, GDC and GDV also executed at closing an FNMA form of affidavit purchaser and vendor on June 28,1983. The

affidavit states that the cash equity in the property was $17,985 and that the value of the property was $62,985. In fact, the actual value of the property was under $40,000, or more than $5,000 less than the mortgage loan amount. In fact, GDV knew that because the loan amount exceeded the market value of the Housing Unit, the class representatives would receive negative equity of more than $5,000 at the time of closing.

27. **MORTGAGE PLACEMENT**. GDV knew that consummation of the loan transaction by the class representatives would give rise to claims and defenses to payment. GDV also knew that by immediately placing the loan in the stream of commerce where they could be acquired by parties claiming holder in due course status, the class representatives may be deprived of

defenses to payment of the loan which could be asserted against such holders.

28. **NON-DISCLOSED FACTS**. GDV failed to disclose to the class representatives that: (a) the loan arranged would result in the class representatives obtaining negative equity because the value of the Housing Unit was less than the mortgage loan amount; (b) the appraisal of the Housing Unit was inaccurate and did not conform to industry standards; (c) no lender applying industry standards would accept the GDV appraisal or make a conventional residential purchase money loan in the amount requested; and, (d) GDV, because of its GDC-controlled and dominated status, and inherent conflict of interest as a result thereof, did not intend to negotiate a conventional, arm's length purchase money residential loan as

requested by the class representatives in their loan application.

**CLASS REPRESENTATION ALLEGATIONS**

29. **CLASS DEFINITION**. Plaintiffs are members of a class consisting of al those persons (excluding members of the North Port Out of State Lot Owners Association) who obtained mortgage financing arranged by GDV and secured by a GDC Housing Unit Located in a GDC Florida Community, where such mortgage loans were negotiated to FNMA by GDV between January 3, 1983, and July 1, 1985, and where such mortgage loans are not in foreclosure.

**CLASS ACTION PREREQUISITES**

30. **NUMEROSITY**. As of November 30, 1990, there were approximately 1,600 mortgage loans made by the Plaintiffs which were originated by GDV and are now held by FNMA. The class is so numerous

that joinder of all members is impractical. The approximate principal balance of GDV mortgage loan pool was approximately $85 million as of November 30, 1990.

31. **TYPICALITY**. The claims of the Plaintiffs are typical of the claims of the class:

(a) Each Plaintiff entered into a contract with GDC to purchase a Housing Unit in a GDC Florida Community. Each Plaintiff was credited an amount as partial consideration for the purchase of the Housing Unit under GDC's lot equity transfer agreements and as a GDC sales concession;

(b) Each Plaintiff, by entering into a GDC contract to purchase the GDC Housing Unit, elected to obtain mortgage financing from a lender designated by GDC;

(c) Each Plaintiff used GDV as a mortgage broker, completed a mortgage questionnaire and submitted a FNMA form of residential loan application to GDV for purchase money conventional mortgage financing, paid a loan application fee, an appraisal and credit report fee, and a loan origination fee to GDV, executed closing documents (including a purchaser/vendor affidavit), and entered into a variable rate mortgage loan originated by GDV for the purchase of a GDC housing Unit in an amount equal to or in excess of the actual fair market value of the Housing Unit, and made loan payments to GDV as servicing agent of FNMA;

(d) GDV accepted a mortgage questionnaire and a FNMA/FNMA form of residential loan application for purchase

money conventional mortgage financing from each Plaintiff, charged a loan application fee, a loan origination fee, appraisal and credit report fee, performed underwriting services, obtained a nonconforming appraisal which inaccurately valued the GDC Housing Unit as being equal to the GDC sales price, supervised the preparation and execution of loan documents (including a FNMA form of Purchaser/Vendor Affidavit), arranged title and hazard insurance with GDC subsidiaries, and placed the variable rate mortgage loans with FNMA;

(e) GDV failed to disclose to each Plaintiff that: (a) the loan arranged would result in Plaintiffs obtaining negative equity or no equity because the value of the Housing Unit was equal to or less than the mortgage loan amount; (b)

the appraisal of the Housing Unit was inaccurate and did not conform to industry standards; (c) no lender applying industry standards would accept the GDV appraisal or make a purchase money loan in the amount requested; and, (d) GDV, because of its GDC controlled and dominated status, had a conflict of interest and did not intend to negotiate a conventional, arms-length purchase money residential loan with and for the Plaintiffs.

(f) As a direct and proximate result of the conduct of GDC GDV each Plaintiff sustained the following damages:

(i) Overpayment for the Housing Unit by an amount equal to the difference between the purchase price and the fair market value of the Housing Unit;

(ii) Payment of interest and financing charges on an excessive note and

mortgage from the date of origination thereof and continuing through the present;

(iii) Overpayment of origination fees, closing costs, title insurance, hazard insurance and other fees and settlement costs;

(iv) Loss of the use of the money committed to excessive mortgage payments, purchase price and loan origination and closing fees; and

(v) Such other damages as the court deems just and proper.

32. **FAIR AND ADEQUATE REPRESENTATION**. The Plaintiffs will fairly and adequately represent the interests of the class, who have no interests adverse to theirs. The class is represented by undersigned counsel who are experienced in class action litigation and have sufficient

resources and staffing to ensure vigorous prosection of the class claims.

33. **COMMON QUESTIONS OF LAW AND FACT**. The claims of the Plaintiffs raise questions of law or fact common to those raised by each member of the class. The complaint seeks a judicial determination of whether the subject mortgages and notes held by FNMA are valid and enforceable in the face amounts and seeks recoupment and damages from FNMA. The Plaintiffs have common issues, claims and defenses to enforceability of the notes and mortgages as set forth in Counts 1 through 6.

Certification Under Rule 23 (b) (2)

34. **FNMA ACTIONS AS TO CLASS**. FNMA has acted on grounds generally applicable to the class including:

(a) purchasing Plaintiffs' loans from GDV pursuant to a purchase agreement'

(b) employing GDV as its servicing agent and accepting mortgage payments from all Plaintiffs;

(c) enforcing payment of the notes.

Certification Under Rule 23 (b)(3)

35. **PREDOMINANCE OF COMMON ISSUES**. The common issues of law and fact in this litigation, including those referred to above, predominate over any issues as to individual Plaintiffs. The predominant issues in this case are whether the notes and mortgages made by the Plaintiffs and held by FNMA are valid and enforceable in their face amounts and whether Plaintiffs are entitled to recoupment and damages from FNMA arising out of common defenses and claims. These issues are common to all Plaintiffs and predominate over individual issues.

36. **SUPERIORITY OF CLASS ACTION TREATMENT**. Certification of this class action is superior to other methods for the fair and efficient adjudication of the controversy. Joinder or consolidation of the hundreds of Plaintiffs' claims and suits with concomitant individual representation is clearly unworkable, and separate prosecution of claims by Plaintiffs in various courts clearly entails unnecessary duplication and expense for FNMA, the Plaintiffs, and court systems as well as potentially conflicting results based on the same essential facts.

37. **INDIVIDUAL PROSECUTION**. There appears to be no overriding interest for Plaintiffs to individually control the prosecution of separate actions where the class action adequate representation

requirement is met. Prosecution of separate actions could only visit unnecessary expense on Plaintiffs.

38. **NATURE AND EXTENT OF EXISTING LITIGATION**. There is no known existing litigation between Plaintiffs and FNMA which will determine the enforceability and validity of the subject GDV mortgage loans or establish recoupment and damages for class claims. On information and belief, there are approximately 87 foreclosure actions on GDV loans pending as of November 30, 1990.

39. **CONCENTRATION OF THE LITIGATION IN THIS FORUM**. Concentration of the litigation in this forum is desirable for reasons including the following:

(a) virtually all plaintiffs are out-of-state residents for whom the

Southern District of Florida is as convenient as any other forum; and

(b) GDV, as the key non-party participant in the matters alleged herein, has its principal place of business in Dade County, negotiated with FNMA from Dade County, and, on information and belief, would have most of its employee/witnesses and corporate records in Dade County, Florida.

40. **DIFFICULTIES IN CLASS ACTION MANAGEMENT**. Plaintiffs do not anticipate any unusual difficulties in management of the case as a class action which appears to be an efficient and expeditious method of handling the litigation.

**COUNT 1 - DECLARATORY JUDGMENT**

41. **REALLEGATIONS**. Plaintiffs reallege paragraphs 1 through 40 as if fully set forth herein.

42. **ACTION**. This is an action for declaratory relief and for supplemental relief within the equitable jurisdiction of this Court.

43. **DOUBT**. A bona fide, present and actual need exists for a declaration of whether the mortgages and notes made by Plaintiffs and held by FNMA are valid and enforceable obligations. The Plaintiffs are in doubt as to whether FNMA can enforce the notes and mortgages in their face amounts.

44. **RELIEF REQUESTED**. Plaintiffs have an interest in the subject matter of this action which is adverse to that of FNMA. Plaintiffs seek a determination that the notes and mortgages are not enforceable in their face amounts, that the Plaintiffs have common affirmative defenses allowing recoupment and damages

for the common claims as set forth in Counts 2-5. The adverse legal interests of the parties are of sufficient immediacy and materiality to warrant a declaratory judgment. The relief sought is a declaration with regard to current controversy as to legal rights under ascertainable facts.

WHEREFORE, Plaintiffs request that the Court:

(a) take jurisdiction of this matter;

(b) determine the existence of the class;

(c) declare that the mortgages and notes are unenforceable in their face amounts;

(d) provide supplemental relief to allow recoupment for common defenses

and damages for common claims as in Counts 2-5;

(e) award attorney fees to the Plaintiffs' counsel from the common fund created; and

(f) grant such other relief as the Court deems appropriate and necessary.

**COUNT 2 - UNCONSCIONABILITY OF LOAN TRANSACTION**

45. **REALLEGATIONS**. Plaintiffs reallege paragraphs 1 through 40 as if fully set forth herein.

46. **ACTION**. This is an action in equity for recoupment and damages for unconscionability of the GDV mortgage loans.

47. **LOAN-TO-VALUE RATIO**. The loans are in amounts which are in excess of the value of the Housing Units and are unreasonable and unfair. The

marketability of each Housing Unit is substantially reduced when encumbered by a mortgage in excess of its value. This material fact was known to GDV but concealed from each of the Plaintiffs.

48. **FACTS CONCEALED**. GDV also failed to disclose that: (a) the loan arranged would result in Plaintiffs obtaining negative equity or no equity because the value of the Housing Unit was less than the mortgage loan amount; (b) the appraisal of the Housing Unit was inaccurate and did not conform to industry standards; (c) no lender applying industry standards would accept the GDV appraisal or make a conventional, residential purchase money loan in the amount requested; and (d) GDV, because of its GDC-controlled and dominated status, and inherent conflict of interest as a

result thereof, did not intend to negotiate a conventional, arm's length purchase money residential loan as requested by the Plaintiffs in their loan application.

49. **THE GDC TRANSACTION**. GDC concealed from customers that the prices of GDC housed were substantially higher both than the prices of other comparable new houses in those same communities and than the prices at which GDC houses could be resold. GDC concealed from Plaintiffs that they would have no equity int heir house since GDC houses have a value in the open market much lower than their selling price and, except in extraordinary instances, lower than the mortgages placed upon them. GDC was able to conceal the value of GDC houses through the actions of its subsidiary, GDV, in arranging what

appeared to be conventional purchase money mortgage financing and placing those loans with FNMA.

50. **GDC SALES PROGRAMS**. GDC's sales programs were carried out through; (a) direct dealings with the Plaintiffs which were intended to induce them to buy a GDC house; (b) measures which were intended to conceal generally from the buying public that GDC's houses were priced substantially above the rest of the housing market; and (c) measures intended to minimize the monetary loss to GDC caused by the eventual discovery by some GDC homeowners of negative equity or no equity in the GDC houses and the GDC houses homes were substantially over-priced. These different aspects of the sales program, which overlap, are described below.

Dealings with the Purchaser

51. **TARGET MARKET**. GDC's efforts to sell houses were directed primarily at owners of undeveloped GDC homesites. These homesite owners, like Plaintiffs, generally did not live in Florida and so were not familiar with the housing market in GDC communities. Thy were unaware, therefore, of the essential fact commonly known to those who live in the area of the GDC communities--that GDC houses were priced substantially higher than comparable houses built by others in those same communities. GDC homesite owners were generally unsophisticated in real estate transactions. Moreover, many were recent immigrants to the United States. GDC sold its homesites and houses to its customers through a sales force located in and near their primary residence. The

largest concentration of GDC's customers was in the Northeast and the Midwest; however, there also were customers in other parts of the United States, Canada and other foreign countries.

52. **HOMESITE SALES**. Since GDC generally sold its houses to purchasers of its homesites, the housing sales process began with the sale of a homesite. Indeed, the Sales presentation emphasized that an advantage of buying a GDC homesite was that it could be traded-in to acquire a home in Florida in just a few years. In addition, GDC salespeople noted that GDC prices were appreciating in the GDC communities and that the purchase of a homesite was, therefore, a good investment. After the homesite contract was signed, GDC remained in contact with the customer through its customer service

department (which sought to ensure that the buyer made his monthly payments on the homesite), its sales people and through mailings of brochures, and other advertising. By means of these contacts, GDC sought to instill in its homesite owners trust in GDC as a reputable, benevolent and trustworthy corporation. These contracts were also intended to foster an image of GDC as a responsible community developer and planner--rather than just as a seller of real estate--which could be relied upon to treat its customers fairly. GDC's literature also fostered a positive image of the economic conditions in the various communities. In addition, GDC kept its customers informed of its frequent price increases for homesites and houses in its communities. This information created a sense of

urgency and was intended to motivate the customer to buy a house "now" rather than wait until he paid for his homesite. GDC used its price increases as a "sell against" (GDC's own term), i.e., a reason to buy before the prices went up even further. Moreover, the news of steady price increases tended to create the impression that prices in the real estate market in the GDC Florida communities were generally rising when, in fact, that was not the case. During the relevant period GDC's land and house prices rose at a much higher rate than those of other sellers of land and houses in the GDC Florida communities.

53. **HOMESITE APPRECIATION**. After some period of time a GDC salesperson contacted the homesite purchaser to induce him to purchase a house. The salesperson

stressed the advantage of acting "now" rather than waiting several more years. The GDC sales presentation focused upon convincing the homesite owner to use the equity and "appreciation" in his homesite to purchase a home. The salesperson generally told the homesite purchaser that his lot had appreciated since he contracted to buy it and that he would receive a credit for some or all of his appreciation and hid equity (i.e., the cash already paid toward the purchase of the lot) in connection with a home purchase. In its written literature, GDC defined that "appreciation" as the difference between the current GDC price for the homesite and the price at which the customer contracted to buy the lot several years earlier. However, as GDC knew and understood, customers commonly--

and wrongly--believed that such appreciation reflected an increase in the value of their land. In fact, that was not the case. GDC's prices for these homesites were substantially higher than their value on the open market. GDC's price increases did not correspond to any increases in land values.

54. **SOHO SOLICITATION**. The prospective purchaser of a GDC house was encouraged by the GDC salesperson near his primary residence to take a three-day trip to one of the GDC Florida communities in order to make the purchase. This selling trip was arranged by GDC and the cost was mostly paid by GDC. Before a customer was sent on one of these trips (called a "SOHO" by GDC, for "Southward Ho!") GDC sought to ensure that the purchaser, or "unit" (GDC's term for a SOHO customer),

was financially qualified and properly motivated to purchase a GDC house.

55. **SOHO TRIP**. GDC portrayed the SOHO trip as an opportunity to make an informed decision. However, every effort was made by GDC and its salespeople to ensure that the "unit" did not discover that GDC's house prices were substantially higher than the rest of the market. The GDC salesperson assigned to the customer in the Florida community was supposed to stay with the customer the entire time he was there in order to maintain control. GDC did not tell the customer that he could buy a comparable house for a lower price from GDC's subsidiary, Five Star Homes. GDC did not tell the customer that the resale price of his GDC house was likely to be substantially lower than its GDC price. The salespeople did not tell

customers that real estate values and prices in the communities were not generally going up and that GDC's prices were not competitive. While there was some appreciation in the value of homes built by other builders, that was generally not the case for GDC houses built since around 1982. Only GDC's prices went up substantially.

56. **GDV FINANCING**. Those customers who agreed to purchase a gdc house while on the SOHO trip and who elected to obtain financing from GDC's designated lender were directed by the GDC salesperson to the GDV office for the purpose of arranging mortgage financing. GDC portrayed this mortgage facility as a benefit to its customers, calling it part of the GDC "One-Stop Shopping" program. However, the benefit was to GDC. In fact,

the rates and costs for mortgages placed through GDV tended to be higher than local lending institutions. More important, GDC would not have been able to sell its GDC houses without its GDV mortgage brokerage facility, as other lending institutions using industry loan standards would not have granted the same size mortgages on GDC houses. That is because GDC prices were substantially higher than the open market value of its houses and under standard industry loan to value ration determinations the loan amount would have been substantially lower than the loan offered through GDV. The customer would have had to pay the difference between the lower loan amount and the contract price in cash -- a circumstance which would have prevented the purchase in most instances and would have apprised the purchaser of

the inflated selling price. The GDC sales price was supported by a non-conforming appraisal performed by a GDV appraiser (using only GDC comparables) which showed the house's market value as equal to the price. By contrast, an outside lender would grant its mortgage based on a conforming market appraisal, which would show that the GDC house had a market value substantially below its price and lower than the proposed GDV mortgage. The outside lender, acting on such an appraisal, would, therefore, only grant a much smaller mortgage, it at all. That is so because a lender is very unlikely to grant a mortgage equal to or greater than the value of the house. Lenders generally require that the house purchaser have some equity in the property. With a mortgage equal to 75% of the purchase price, the

GDC purchaser was in fact left with no equity or negative equity in his Housing Unit.

57. **IMPEDIMENTS TO OUTSIDE FINANCING.** A GDC homebuyer seeking to finance with an outside, arm's length lender would discover that his GDC house was priced substantially over the market. To prevent such discovery, GDC and GDV instituted certain practices intended to discourage homebuyers from seeking outside financing. First, GDC and GDV strongly promoted the convenience of obtaining a mortgage through the services of GDV. If a buyer did not agree to obtain his mortgage through GDV, Gdc did not permit a financing contingency clause in his House Sales Contract. If a homebuyer intended to pay case, he was required to demonstrate that he had such funds at the

time of the contract. These requirements were a strong impediment to seeking financing outside GDV. In fact, approximately 80% of GDC homebuyers obtained financing from GDV.

58. **APPRAISAL CONCEALMENT**. GDV did not tell the Plaintiffs that the appraisal done on his property in connection with the mortgage was non-conforming in that it was performed using a method--not generally acceptable in the real estate industry--which supported the higher GDC price. (As described above, the GDC appraisal used only like GDC housed as comparables. This ensured that the market value equaled the purchase price of the GDC house.) Moreover, GDV did not give the homebuyer a copy of the appraisal, refusing to do so even when asked directly, so that he would not discover

that the appraisal did not reflect the value of the house on the open market. GDV did not tell the buyer that it retained these appraisers because they were willing to perform the appraisals according to GDV's special guidelines using only GDC houses as comparables, which supported GDC's higher prices Finally, GDV did not tell the homebuyer that if he were to seek financing at other lending institutions he would most likely be turned down because the open-market value of the property was lower than the amount of the mortgage.

59. **RENTAL MANAGEMENT**. GDC and GDV knew that the vast majority of their homebuyers did not intend to move into the house at all or for at least several years after their purchase. GDC encouraged such buyers to purchase the house as a rental

property. Florida Home Finders ("FHF"), GDC's subsidiary, had a management division which located and placed tenants and managed the property, a service which was also touted as part of GDC's "One-Stop Shopping". GDC and FHF salespeople did not disclose that the rental income would not cover the expense of owning the house and did not make accurate projections as to the rental income which the owner could expect to receive. GDC and FHF did not inform its customers, prior to purchase, that the market and resale value of rental homes was lower than those which are owner-occupied. GDC and FHF did not inform its homebuyers prior to purchase, of the oversupply of rental properties in some of the Florida communities which, of course, lowered rental prices.

60. **HOUSING CUSTOMER SERVICE.** Beginning in 1985, GDC maintained a Housing Customer Service Office ("HCS") to handle complaints from homeowners; before that time complaints were dealt with by various departments. The vast majority of serious homeowner complaints arose when homeowners discovered that their GDC houses were worth substantially less than they paid for them. As most homeowners were not residents in the communities, they did not easily discover that their houses were priced well above the rest of the market. Typically, the discovery occurred in one of two ways; (a) when the homeowner sought to resell his house and was told by the real estate broker or an appraiser what the value of his house was on the open market; or (b) when the homeowner sought to refinance his mortgage

with a bank, and was told that the bank would only grant a much smaller mortgage because the current GDV mortgage was greater than or close to the market value of the home.

61. **COMPLAINT STRATEGY**. In dealing with homeowners who had discovered their homes were overpriced, HCS sought to achieve two purposes: (a) to resolve the complaint with as little cost to GDC as possible; and (b) to avoid publicity which would alert other homeowners and the buying public that GDC's houses were priced above the rest of the market. HCS sought to mislead the homeowner as to the cause of the lower value of the home. That is, HCS sought to portray the problem as a decline or "slump" in the real estate market and the Florida economy since the time of purchase, due to factors beyond

GDC's control. This was a different view of the market than portrayed by GDC to its customers prior to purchase and a different view of the market than that being portrayed contemporaneously by GDC salesmen to Units then considering a GDC house purchase. In fact, the loss in market value occurred the moment the homebuyer bought a GDC house as it was priced substantially above the rest of the market. It, however, the homeowner in his complaint also showed he was aware that comparable new homes may be bought for substantially less than the GDC price, then HCS response claimed in addition to a "soft"resale market, that GDC's prices were higher because GDC incurred higher costs than local builders. If the complaining homeowner questioned the validity of the original appraisal

obtained by GDV, the HCS response frequently provided a misleading explanation as to how the appraisal was performed in some cases concealing the fact the only other GDC houses were used as comparables. All homeowner complaints concerning over-pricing were essentially equally justified, as the problem was a result of GDC's sales program, which was designed to conceal and obscure the fact that its houses were priced much higher than other comparable houses, and higher than their values on the open market. However, HCS generally offered the most compensation to those homeowners who were the most persistent, and the amount of the settlements depended on how capable the homeowner appeared to be ot pursuing his claim. The best settlements-such as repurchase of the house and a cash

payment--were given to those who most credibly threatened to publicize their problem by going to the news media.

62. **PRICE/VALUE REPORTS**. Since in and around 1985, GDC obtained reports and performed studies showing the substantial discrepancy between the prices of GDC houses and their value on the open market. GDC resisted, with greater or lesser success, disclosure of such information because of the obviously negative impact on sales. Thus, for example in 1985, GDC surveyed homeowners in the largest of its Florida communities as to the kinds of information they wished to receive from GDC. A majority responded that they wanted information about resale values and prices of GDC houses. GDC misrepresented the results of that survey to its homeowners, concealing the fact that

homeowners as a group sought the information on resales. GDC continued to avoid, presenting such information tin subsequent publications.

63. **ABSENCE OF MEANINGFUL CHOICE**. GDC's marketing strategy and the failure of GDC and GDV to disclose the foregoing material facts deprived Plaintiffs of a meaningful choice in determining whether to elect to enter into their loan transactions.

64. **OVERREACHING**. By the foregoing GDC and GDV have overreached the Plaintiffs and have gained an unjust and undeserved advantage which it would be inequitable to permit GDV's assignee FNMA to enforce.

65. **DAMAGES**. As a direct and proximate result of GDC and GDV's conduct as above described, Plaintiffs were

damaged as more particularly set forth above in paragraph 31(f).

66. **LIABILITY**. FNMA, as purchasers of GDV loans are liable to Plaintiffs for recoupment and for damages as set forth above in paragraph 31(f).

WHEREFORE, Plaintiffs demand recoupment and judgment for damages together with interest, and costs and demand trial by jury on all issues triable by jury.

COUNT 3 - BREACH OF FIDUCIARY DUTY

67. **REALLEGATIONS**. Plaintiffs reallege paragraphs 1 through 40 as if fully set forth herein.

68. **ACTION**. This is an action for breach of fiduciary duty and self-dealing by GDV and for damages in excess of the minimum jurisdictional amount.

69. **DUTY OF DISCLOSURE AS FIDUCIARY**. GDV, as a licensed mortgage broker, arranged financing for each Plaintiff in consideration of payment of loan application fees, underwriting fees, and origination fees. GDV had a fiduciary duty, as a mortgage broker, to disclose material facts as set forth in paragraph 28. GDV's failure to disclose such facts constitutes a breach of its fiduciary duty to each Plaintiff entitling Plaintiff to recoup the fees paid to GDV by them and to recoup the amount of their consequential damages flowing therefrom as more particularly set forth above in paragraph 31(f).

70. **DUTY OF DISCLOSURE UNDER SPECIAL CIRCUMSTANCES**. GDV knew that Plaintiffs did not have an equal opportunity to become apprised of facts known to GDC

concerning the loan transaction, which facts were basic to their decision to enter into the loan transaction. Further, GDV intended to negotiate and place the mortgage loans executed by Plaintiffs in the stream of commerce where they could be purchased by entities claiming holder in due course status, which, if established would cut off all defenses to payment. GDV also knew that the effect of the loans would be financially detrimental to Plaintiffs in that it would deprive them of their equity in the Housing Unit and make a sale of the Housing Unit virtually impossible without incurring additional losses. On the other hand, the excessive loans resulted in substantial financial benefits to GDC and GDV far above the customary loan underwriting and origination fees collected from the

Plaintiffs since the origination and sale of the loans made GDC's inflated sales pricing practices viable. The above facts constitute special circumstances giving rise to an affirmative duty of disclosure by GDV of the material facts set forth in paragraph 28 regardless of GDV's status as a mortgage broker. GDV's failure to disclose such facts constitutes a breach of its affirmative duty of disclosure to each Plaintiff entitling each Plaintiff to recoup the fees paid to GDV by them and to recoup the amount of their consequential damages flowing therefrom as more particularly set forth above in paragraph 31 (f).

71. **LIABILITY**. FNMA, as purchasers and holders of GDV loans are liable to Plaintiffs for recoupment and for damages as set forth above in paragraph 31(f).

WHEREFORE, Plaintiffs demand recoupment and judgment for damages together with interest, and costs and demand trial by jury on all issues triable by jury.

COUNT 4 - BREACH OF CONTRACT

72. **REALLEGATIONS**. Plaintiffs reallege paragraphs 1 through 40 as if fully set forth herein.

73. **ACTION**. This is an action for breach of contract and for damages in excess of the minimum jurisdictional amount.

74. **FORMATION OF CONTRACT**. Plaintiffs submitted a loan application, furnished necessary credit data, and paid a loan application fee as requested by GDV. Upon acceptance of Plaintiffs' written loan application and fee, GDV undertook to process the type of loan

requested therein and to make a determination of the amount and terms of the requested loan, if approved.

75. **CONTRACT TERMS**. The type of loan requested by the application was expressly stated as a "conventional" loan for the stated purpose of purchasing the residence described therein pursuant to the Housing Unit purchase contract submitted with the loan application. Implicit in the contractual undertaking of GDV to process the loan application was the agreement to do so in good faith and with the degree of care which a reasonably prudent lender would have exercised under the same or similar circumstances. By utilizing a FNMA form of loan application, the standard of care assumed by GDV was that prescribed in the residential loan underwriting guidelines published by FNMA.

These guidelines establish the industry standard for a commercially reasonable determination of whether to approve or disapprove a loan application and if approved, the amount of the offered plan.

76. **BREACH OF OBLIGATION OF REASONABLE CARE**. By procuring and utilizing appraisals which materially deviated from and did not conform to FNMA guidelines, GDV breached its duty of care owed to Plaintiffs in processing their loan application.

77. **OBJECTIVE BREACH OF OBLIGATION OF GOOD FAITH**. By intentionally failing to apply commercially reasonable standards in processing the loan application in order to secure a significant financial benefit for itself and GDC and with knowledge of the substantial economic loss to be suffered by Plaintiffs as a result

thereof, GDV breached its obligation of good faith.

78. **SUBJECTIVE BREACH OF OBLIGATION OF GOOD FAITH**. By preparing or utilizing loan documents which falsely stated the Plaintiffs' equity in the Housing Unit transaction, with knowledge that such documents were false, GDV failed to act with honesty in fact in the loan transaction and thereby breached its obligation of good faith.

79. **DAMAGES**. As a direct result of GDV's breach of its contractual obligations, Plaintiffs were damaged as more particularly set forth above in paragraph 31(f).

80. **LIABILITY**. FNMA, as purchaser and holder of GDV loans is liable to Plaintiffs for recoupment and for damages as set forth above in paragraph 31(f).

WHEREFORE, Plaintiffs demand recoupment and judgment for damages together with interest, and costs and demand trial by jury on all issues triable by jury.

**COUNT 5 - NEGLIGENT LOAN PROCESSING AND UNDERWRITING**

81. **REALLEGATIONS**. Plaintiffs reallege paragraphs 1 through 40 and 74 through 78 as if fully set forth herein.

82. **ACTION**. This is an action for negligence and for damages in excess of the minimum jurisdictional limits of this Court.

83. **DUTY OF CARE**. By accepting the loan application and fee, GDV owed a duty of care to Plaintiffs to process the loan application in accordance with commercially reasonable standards.

84. **BREACH OF DUTY OF CARE**. GDV by failing to process each Plaintiff's loan application in accordance with standard industry underwriting procedures for conventional purchase money residential financing breached the duty of care owed by a reasonably prudent lender.

85. **CAUSATION AND DAMAGES**. As a direct and proximate result of GDV's negligent loan processing, Plaintiffs were damaged as more particularly set forth above in paragraph 31(f).

86. **LIABILITY**. FNMA, as purchaser of GDV loans, is liable to Plaintiffs for recoupment and for damages as set forth above in paragraph 31(f).

WHEREFORE, Plaintiffs demand recoupment and judgment for damages together with interest, and costs and

demand trial by jury on all issues triable by jury.

**COUNT 6 - AFFIRMATIVE DEFENSES**

87. The Plaintiffs reallege Counts 2 through 5 and assert the Counts as defenses to payment of the notes.

**DEMAND FOR JURY TRIAL**

Plaintiffs demand trial by jury of all issues so triable.

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Attorneys for Plaintiffs

By: _____
MARILYN SHER, ESQ.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 21st day of June, 1991, to: D. CULVER SMITH, III. ESQUIRE, Steel Hector & Dais, 1900 Phillips Point West, 777 S. Flagler Drive, West Palm Beach, Florida 33401.

By:_____

MARILYN SHER, ESQ.

UNITED STATES
DISTRICT COURT
SOUTHERN DISTRICT
OF FLORIDA

CASE NO.: 91-0140-
CIV-KEHOE

BALMAIN B. COMRIE and
JUANITA A. COMRIE, etc.,

Plaintiffs,

vs. ORDER ON MOTION TO DISMISS
SECOND AMENDED COMPLAINT

FEDERAL NATIONAL MORTGAGE
ASSOCIATION,

Defendant.
_____/

*THIS CAUSE* is before the Court upon the motion of the Defendant to dismiss the Second Amended Complaint.

After a review of the motion, response and reply, it is

*ORDERED AND ADJUDGED* that the motion is *GRANTED*.

1. With regard to the Count I claim for declaratory relief, see the law set forth in Emory v. Peeler, 756 F.2d 1547,

1551-52 (11th Cir. 1985). See also Angora Enterprises, Inc. v. Condominium Association of Lakeside Village, Inc., 796 F.2d 384, 387-88 (11th Cir. 1986). And see In Re Smith, 737 F.2d 1549, 1552 n. 7 (11 Cir. 1984), and Allie v . Ionata, 503 So.2d 1237, 1239-40 (Fla. 1987).[1]

2. With regard to the Count II claim for damages on the basis of "unconscionability," the Court notes that the Plaintiffs have conceded that their recovery is limited to "recoupment." However, such recovery is itself a theory incorporated into Count I, and its

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[1] Concerning the issue of the "close connection doctrine," the alleged relationship between the Defendant and the seller of the mortgage loans, and the acknowledged type of transaction in question, preclude the application of this doctrine. See, e.g., Equico Lessors, Inc. v. Ramadan, 493 So.2d 516, 518 (Fla. 1st DCA 1986). Concerning the issue of the Plaintiffs' note qualifying as a "negotiable instrument," see the current provisions of Section 673.106, Florida Statutes.

success, therefore, depends on the survival of Count I, which has been dismissed. (See Paragraph I, hereinabove.)

3. With regard to the Count III claim for damages for breach of fiduciary duty, see the discussion of the required "fiduciary relationship" necessary to sustain such a claim in Bankest Imports, Inc. v. ISCA Corporation, 717 F.Supp. 1537, 1540-41 (S.D. Fla. 1989). See also Kee v. National Reserve Life Insurance Company, 918 F.2d 1538, 1543 (11th Cir. 1990).

4. With regard to the Count IV claim for damages for breach on contract, see, generally, State v. De Anza Corporation, 416 S.2d 1173, 1176 (Fla. 5th DCA 1982) for the holding that the mere assertion that a contracting party has failed to act

in good faith does not state a cause of action. More specifically, however, relative to the Defendant's vicarious liability under the facts alleged, see Solis-Ramirez v. United States Department of Justice, 758 F.2d 1426, 1429 (11th Cir. 1985). See also Quality Foods de Centro America v. Latin American Agribusiness Development corporation, 711 F.2d 989, 995 (11th Cir. 1983).[2]

5. With regard to the Count V claim for damages based on negligence, see Electronic Security Systems Corporation v. Southern Bell Telephone & Telegraph Company, 482 So.2d 518, 519 (Fla. 3d DCA 1986). See also Interstate Securities

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[2] Relative to the issue of the Defendant's "vicarious liability" in Counts 3 and 5, the holdings in the Solis-Ramirez and Quality Foods cases have similar applicability.

Corporation v. Hayes Corporation, 920 F.2d 769, 776 n.11 (11th Cir. 1991).

6. Finally, with regard to Count VI claim, which (in its entirety) simply "...reallege[s] Counts 2 through 5 and assert[s] th[os]e Counts as defenses to payment of the notes," that count fails to set forth a separate, independent claim for affirmative relief.

*DONE AND ORDERED* in Chambers at Miami, Florida, this 19th day of August, 1992.[3]

JAMES W. KEHOE
UNITED STATES
DISTRICT JUDGE

Copies furnished to:
Marilyn Sher, Esq.
Richard Bennett, Esq.
Douglas S. Lyons, Esq.

[3] Pursuant to this ruling, insofar as any other pending motion is not rendered moot (including the motion to stay, motion for class action certification, etc.), and such motion is DENIED.

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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No. 92-4872

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D. C. Docket No. 91-140-CIV

BALMAIN B. COMRIE,
JUANITA A. COMRIE, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

versus

FEDERAL NATIONAL MORTGAGE ASSOCIATION,

Defendant-Appellee

GDV FINANCIAL CORPORATION,

Respondent.

---

Appeal from the United States District Court for the Southern District of Florida

---

(October 19, 1993)

Before FAY and CARNES, Circuit Judges, and JOHNSON, Senior Circuit Judge.

PER CURIAM: AFFIRMED. See 11th Cir. Rule 36-1.

"Costs taxed against plaintiffs-appellants."

Judgment Entered: October 19, 1993
For the Court: Miguel J. Cortez, Clerk

By: _____
Deputy Clerk

ISSUED AS MANDATE: January 21, 1994

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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No. 92-4872

---

BALMAIN B. COMRIE,
JUANITA A. COMRIE, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

versus

FEDERAL NATIONAL MORTGAGE ASSOCIATION,

Defendant-Appellee

GDV FINANCIAL CORPORATION,

Respondent.

---

On Appeal from the United States District Court for the Southern District of Florida

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: FAY and CARNES, Circuit Judges, JOHNSON, Senior Circuit Judge.

PER CURIAM:

( ✓ ) The Petition(s) for Rehearing are

DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

(  ) The Petition(s) for Rehearing are DENIED and that Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

(  ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/S

UNITED STATES CIRCUIT JUDGE

Supreme Court, U.S.
FILED
MAY 31 1994
OFFICE OF THE CLERK

No. 93-1597

In The

# Supreme Court of the United States

October Term, 1993

BALMAIN B. COMRIE and JUANITA A. COMRIE, on behalf of themselves and of all others similarly situated,

*Petitioners,*

vs.

FEDERAL NATIONAL MORTGAGE ASSOCIATION,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED (AS REPHRASED)

Whether a home mortgagor's request for an advisory opinion that certain counterclaims and affirmative defenses can be asserted successfully against a lender, if and when an action arises in state court to enforce the mortgage loan, constitutes a justiciable controversy under the Federal Declaratory Judgment Act, 28 U.S.C. § 2201(a).

## RULE 29.1 STATEMENT

Respondent, Federal National Mortgage Association, has no parent companies or subsidiaries.

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## STATEMENT OF THE CASE

In 1983, Petitioners, Balmain B. Comrie and Juanita A. Comrie ("the Comries"), purchased a house from General Development Corporation ("GDC"), a large developer of real estate in Florida. The Comries travelled to Florida, at GDC's expense, prior to making this purchase and obtained mortgage financing from GDV Financial Corporation ("GDV"), a subsidiary of GDC.

Respondent, Federal National Mortgage Association ("Fannie Mae"), is a federally chartered corporation which serves the housing industry by operating in the secondary, rather than the primary, mortgage market. Fannie Mae does not originate loans but purchases residential mortgage loans which are closed by primary lenders such as mortgage companies, savings institutions and commercial banks.

Fannie Mae, in the ordinary course of its business, subsequently purchased the Comries' note and mortgage from GDV in the secondary mortgage market. The Comries did not have any dealings or communications with Fannie Mae when they purchased their home from GDC or obtained mortgage financing from GDV. In addition, the Comries did not rely upon any act or omission by Fannie Mae when they entered into their transactions with GDC and GDV.

The Comries do not claim that their GDC house was defective in any way. They now seek, however, to avoid their monthly mortgage obligations because they believe that they paid more money for their home than it was actually worth. The Comries contend that, prior to making their 1983 house purchase, GDC should have told

them that they could have purchased comparable houses from GDC's competitors and from one of GDC's subsidiaries at lower prices and that GDC's prices were not competitive. *See* Petitioners' Appendix ("App.") No. 1, 46-47. Furthermore, although they did not rely upon GDV's appraisal of their home prior to purchasing it from GDC, the Comries allege that the appraisal was inflated. App. No. 1, 19-22. The Comries sued Fannie Mae for declaratory relief and for damages based upon unconscionability by GDC and GDV and breach of fiduciary duty, breach of contract and negligence by GDV. *Id.* at 1-69. GDC and GDV are not parties to this action.

The Comries' statement of the case is generally correct with respect to the case's procedural history, but it contains various factual statements – e.g., that the District Court dismissed their second amended complaint without leave to amend, Pet. 6, and that criminal and bankruptcy proceedings were decided in a certain manner, Pet. 11 – that are either wholly erroneous or go far beyond the allegations contained in their complaint.

In the body of this Response, Fannie Mae will discuss the facts as relevant to the legal issues presented.

## REASONS WHY THE WRIT SHOULD BE DENIED

### I. THE PETITION SEEKS AN ADVISORY OPINION FROM THIS COURT WHICH WILL HAVE NO EFFECT WHATSOEVER ON THE JUDGMENT RENDERED BELOW

The Comries challenge the District Court's dismissal of their claim for declaratory relief for lack of a justiciable

controversy. This is the only issue raised by the Petition. Pet. (i). However, this Court's resolution of that issue will result in the needless exercise of judicial labor because the District Court dismissed Count 1 on alternate grounds that are *both* uncontested by the Comries *and* sufficient to support its judgment.

During the proceedings below, Fannie Mae argued and the District Court agreed that even if a justiciable controversy existed between the parties, numerous factors militated against the court's exercise of its discretionary declaratory-relief jurisdiction. *See* App. No. 2 at 2; R.1:37-6-11; R.2:47-7. These factors included, but were not limited to, the following:

1. Piecemeal litigation would result because, by the Comries' own admission, a declaratory judgment would not settle the alleged controversy between them and Fannie Mae, for they are saving other related claims and defenses to assert against Fannie Mae in the future and in another forum. R.2:47-18-19.

2. The District Court had no jurisdiction over the property underlying the Comries' note and mortgage. Therefore, a declaration that Counts 2 through 5 of the second amended complaint constituted viable claims and defenses to Fannie Mae's enforcement of the note and mortgage would have had no effect on the appropriate Florida state court's exercise of its *in rem* jurisdiction over the subject property *if* the Comries defaulted and *if* Fannie Mae filed a mortgage foreclosure proceeding.

3. The District Court's determination that the Comries' purported defenses were legally deficient would not preclude them from defaulting on their mortgage note,

thereby failing to settle the alleged "controversy" between the parties.

4. The Comries' request for a determination as to whether Fannie Mae could successfully assert a holder-in-due-course affirmative defense in a hypothetical mortgage foreclosure action not only was too speculative to warrant declaratory relief but also would have sabotaged the sequence of proof and the allocation of burdens of proof that are central to the Florida Uniform Commercial Code policy of encouraging the transfer of negotiable instruments. *See* R.1:37-8-9.

5. The putative class that the Comries sought to represent consisted of individuals who had defaulted on their mortgages and notes and were already parties to pending state court proceedings in which the matters in controversy between Fannie Mae and the state court mortgagors were being fully litigated.

Relying upon *Angora Enters., Inc. v. Condominium Ass'n of Lakeside Village, Inc.*, 796 F.2d 384 (11th Cir. 1986), the District Court recognized that it "could properly have refused to address the merits of the claim by resort to its inherent discretion to decline to entertain a declaratory action." *Id.* at 387. This alternative ground for dismissing Count 1 is consonant with settled precedent of this Court which makes it clear that the Federal Declaratory Judgment Act "is an enabling Act, which confers a discretion on the courts rather than an absolute right upon the litigant." *Public Serv. Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 241 (1952). *See also Green v. Mansour*, 474 U.S. 64, 72 (1985) ("The propriety of issuing a declaratory judgment may depend upon equitable considerations, and is

also 'informed by the teachings and experience concerning the functions and extent of federal judicial power.' ") (citation omitted); *Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. 491, 494 (1942) ("Although the District Court had jurisdiction of the suit under the Federal Declaratory Judgments Act, it was under no compulsion to exercise that jurisdiction.").

The Comries do not contest the District Court's exercise of its discretion to decline declaratory relief nor can they. The District Court's alternate grounds for dismissing their claim for declaratory relief, irrespective of the existence of a justiciable controversy, are sufficient to support its judgment and remain unchallenged by the Comries. Consequently, granting the Petition would serve no useful purpose.

## II. THE QUESTION PRESENTED IS MOOT

In addition to their claim for a declaratory judgment in Count 1, the Comries sought damages from Fannie Mae based on unconscionability by GDC and GDV (Count 2), breach of fiduciary duty by GDV (Count 3), breach of contract by GDV (Count 4) and negligence by GDV (Count 5). The District Court found these claims legally deficient on the merits and dismissed them accordingly. App. No. 2 at 2-5. The Court of Appeals for the Eleventh Circuit affirmed. App. Nos. 3 and 4.

These dismissed claims, however, are the very same causes of action that the Comries sought to "test" in their claim for a declaratory judgment in Count 1. Specifically, the Comries sought a determination as to whether they

would be successful in asserting these claims as affirmative defenses and counterclaims against Fannie Mae if and when an action arose to enforce the note and mortgage in Florida state court.

While the District Court did not render a declaratory judgment, its finding with respect to the legal sufficiency of the claims set forth in Counts 2-5 is precisely the determination that the Comries sought in Count 1. As a result, even if the District Court had found a justiciable controversy present and exercised its discretion to render declaratory relief, its determination that the claims contained in Counts 2-5 were legally deficient would not change the result below. Those rulings, which are not before this Court, render the issues raised herein moot. Therefore, granting the Petition would constitute a mere academic exercise of no consequence.

## III. THE COURTS BELOW FULLY CONSIDERED AND CORRECTLY DECIDED THE ISSUES

The Comries requested an advisory opinion from the District Court. R.2:47-12-13. Essentially, the Comries asked the District Court to answer the following hypothetical question: *If* they decided to default on their mortgage loan, and *if* Fannie Mae subsequently filed a foreclosure action in state court, and *if* the Comries asserted affirmative defenses and counterclaims to the foreclosure action, and *if* Fannie Mae in turn raised its holder-in-due-course status – who would win?

The District Court declined to act as the Comries' counsel observing the Eleventh Circuit's admonition that

"[f]urnishing such guidance prior to the making of the decision . . . is the role of counsel, not of the courts." *Hendrix v. Poonai*, 662 F.2d 719, 722 (11th Cir. 1981). In so doing, the District Court expressly relied upon the controlling authority of this Court as set forth in *Emory v. Peeler*, 756 F.2d 1547, 1551-52 (11th Cir. 1985) (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983); *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 506 (1972); *Golden v. Zwickler*, 394 U.S. 103, 108 (1969)).

The Comries did not allege that they had been injured by past conduct attributable to Fannie Mae, and, like the juror in *Emory*, 756 F.2d at 1552, cited in the District Court's opinion, they failed to allege that any such conduct by Fannie Mae had continued or would be repeated in the future. The record below is devoid of any allegation or showing by the Comries that Fannie Mae threatened or did anything to them, much less communicated with them. The Comries' attempt in this proceeding to suggest otherwise, *see* Pet. 26, is untenable. Any potential harm they may experience is entirely based on a hypothetical contingency.

Yet, the Comries urge this Court to adopt a rule that would require federal courts to render advisory opinions. Pet. 24. Their suggestion that this Court's precedent supports such a result arises from a misreading of *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498 (1972), Pet. 24-28, and flies in the face of a long line of authority from this Court that " '[t]he exercise of judicial power under Art. III of the Constitution depends on the existence of a case or controversy,' and 'a federal court [lacks] the power to render advisory opinions.' " *United States Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 113 S. Ct. 2173,

2178 (1993) (citation omitted). *See also Ashcroft v. Mattis*, 431 U.S. 171, 172 n.2 (1977) ("The second amended complaint also alleges that appellee has another son who '*if* ever arrested or brought under an attempt at arrest on suspicion of a felony, *might* flee or give the appearance of fleeing, and would therefore be *in danger* of being killed by these defendants or other police officers . . . .' Such speculation is insufficient to establish the existence of a present, live controversy.") (citation omitted); *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) ("[A] federal court has neither the power to render advisory opinions nor 'to decide questions that cannot affect the rights of litigants in the case before them.' "); *Golden v. Zwickler*, 394 U.S. 103, 108 (1969) (" '[T]he federal courts established pursuant to Article III of the Constitution do not render advisory opinions.' ").

The Circuit Courts of Appeal are, of course, in accord. *See, e.g., Crowley Cutlery Co. v. United States*, 849 F.2d 273, 276 (7th Cir. 1988) ("You cannot go to a federal court for advice on the legality of a proposed course of action. You must be party to an existing legal dispute. This is true whether you are seeking a declaratory judgment or any other form of relief . . . ."); *Hendrix v. Poonai*, 662 F.2d 719, 722 (11th Cir. 1981) ("[T]he appellants are seeking a declaration that *if* they deny appellee's readmission application, and *if* the appellee subsequently brings an antitrust action based on that denial, then the appellants will be protected from liability by virtue of the *Parker v. Brown* and *Noerr-Pennington* doctrines. We believe that a declaration to this effect would constitute an impermissible 'opinion advising what the law would be upon a hypothetical state of facts.' . . . '[T]here [can] be

no judicial determination that a valid defense exist[s] to a non-existent cause of action.' ") (footnote omitted) (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937), and *Brown & Root, Inc. v. Big Rock Corp.*, 383 F.2d 662, 665 (5th Cir. 1967)); *BP Chems. Ltd. v. Union Carbide Corp.*, 4 F.3d 975, 981 (Fed. Cir. 1993) ("[T]he existence of a patent held by a competitor is insufficient basis for a declaratory action to invalidate the patent.").

## IV. THERE IS NO CONFLICT WARRANTING CERTIORARI REVIEW

The District Court's determination that the Comries failed to satisfy the threshold case or controversy requirement of Article III of the United States Constitution, and the actual controversy prerequisite of 28 U.S.C. § 2201(a), does not conflict with any decision of this Court or of the other Circuit Courts of Appeal. The allegedly conflicting decisions are distinguishable on their facts and on the law.

The Comries' reference to *E. Edelmann & Co. v. Triple-A Specialty Co.*, 88 F.2d 852 (7th Cir. 1937), is but one example of their attempt to manufacture conflict where there is none. Pet. 21. As an initial matter, the hypothetical contingencies present in this action are absent from *Edelmann*. Specifically, in *Edelmann*, the alleged infringer of a patent sought declaratory relief where the owner of the patent charged it with infringement, notified the industry of such charges of infringement and told the alleged infringing company's customers and potential

customers that, unless the infringement was discontinued, a lawsuit would be filed against the infringer and dealers. *Id.* at 853.

More importantly, the Comries' position that their "doubt" (as to the enforceability of their note and mortgage) constitutes a justiciable controversy was expressly considered and rejected by the Seventh Circuit in *Vickers v. Henry County Sav. & Loan Ass'n*, 827 F.2d 228, 231-32 (7th Cir. 1987) ("Any potential harm appellants may experience is entirely based on a hypothetical contingency: if they default on their loan, and if the Loan Association chooses to pursue them personally first rather than foreclose on the property it has secured, they would then have to defend on the issue they raise now. . . . There must be some actual or imminent threatened harm before the matter is justiciable. Any potential harm here, based as it is on hypothetical contingencies, is not imminent, and the appellants are without Art. III standing."); *see also Deveraux v. City of Chicago*, 14 F.3d 328, 330 (7th Cir. 1994) (The "case or controversy" requirement "keeps federal courts in the business of resolving existing legal disputes and out of the business of offering advice on the legality of a proposed course of action.").

Whether a justiciable controversy exists under 28 U.S.C. § 2201(a) is determined on a case-by-case basis with necessarily differing results. *Golden v. Zwickler*, 394 U.S. at 108 (" 'Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory

judgment.' "). The very cases cited by the Comries to establish "conflict" turn on the particular circumstances facing those courts and are readily distinguishable from the instant case. Pet. 18-27. *Cf., e.g., Doe v. Bolton*, 410 U.S. 179, 188-89 (1973) (physicians presented a justiciable controversy where they were *personally threatened* with criminal prosecution in the event they violated a recent state abortion statute *and other physicians had been prosecuted under the predecessor abortion statute*); *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. at 507 ("Although appellees have indicated that they will not prosecute under the Michigan act until adequate land-based pump-out facilities are available to service vessels equipped with sewage storage devices, they *have* sought on the basis of the act and the threat of future enforcement to obtain compliance as soon as possible.").

Moreover, the Comries' discussion of *Lindsey v. Normet*, 405 U.S. 56 (1972), is clearly inapposite. Pet. 21-23. The justiciability of the claim for declaratory relief filed in *Lindsey* was neither raised by the parties nor discussed by the various courts. Why the Comries refer the Court to *Lindsey* is a mystery.

As previously discussed, the District Court's refusal to provide the Comries with an opinion advising what the law would be upon a hypothetical state of facts (that is, whether certain claims and defenses could be asserted successfully against Fannie Mae in a hypothetical state court lawsuit *if* the Comries defaulted and *if* Fannie Mae or some other lender holding their mortgage loan brought an action to enforce the mortgage) is consistent with well-established precedent of this Court. *See supra* section III. In sum, the "conflict" which the Comries hope

to create before this Court is not real and does not satisfy any of the criteria delineated in Supreme Court Rule 10.1.

## V. NO SPECIAL AND IMPORTANT REASONS EXIST FOR GRANTING THE WRIT

The decision below turns solely upon an analysis of the particular facts and circumstances involved and affects only the immediate parties to the case. The Comries state that *their* individual case does "not warrant the expense of proving GDC's fraud and [Fannie Mae's] lack of standing as a holder in due course." Pet. 34. Their assertion that the decisions of the District Court and of the Eleventh Circuit have somehow adversely affected the rights of "approximately 1,500" individuals is wholly misplaced.

The District Court specifically denied the Comries' motion to certify the class as moot given their failure to state a claim for relief. App. No. 2, at 5 n.3. The class certification issues were neither fully briefed by the parties nor considered by the District Court. Consequently, the unnamed members of the putative class could not possibly be affected by the District Court's actions.

Yet, the Comries would have the Court in this proceeding certify the putative class based on their belief that "[w]ithout a class action, these victims are essentially left without a remedy." Pet. 13-14. Such a result, however, would transmogrify the criteria for certifying a class embodied in Federal Rule of Civil Procedure 23. The Comries' concern about the District Court's dismissal of their claim for declaratory relief is admittedly secondary to their desire to have this action certified as a class

before this Court. Clearly, no special and important reasons exist to grant certiorari. S. Ct. Rule 10.1.

## CONCLUSION

For the reasons set forth above, the Petition should be denied.

Respectfully submitted,

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